United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 76-7252

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CITY OF DETROIT, et al.,

v.

GRINNELL CORPORATION, et al.

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY, *Claimants, Appellants.*

On Appeal from the United States District Court for the Southern District of New York

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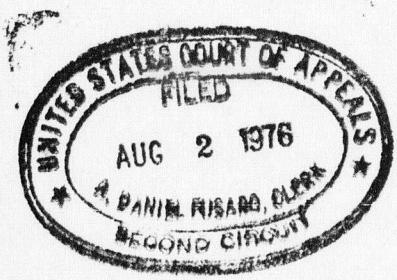
BRIEF FOR CLASS MEMBERS-APPELLANTS



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PRELIMINARY STATEMENT

This is the second appeal taken by class members Bay Fair Shopping Center, *et al.* ("Objectors") from the Honorable Charles N. Metzner's award of attorneys' fees to appellee David Berger, Esquire, ("Petitioner") in a settled class action.[1] In *Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (hereinafter "*Grinnell I*"), this Court re-

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* On the stipulation of the parties, these three appeals from the same Final Judgment (a copy of which was filed in three companion District Court actions) involving the same appellants and appellee, and identical issues, were consolidated on June 18, 1976, by Circuit Judge Gurfein.

[1] Wherever feasible, the appellants and appellee will be referred to as Objectors and Petitioner, respectively, in accordance with the provisions of Rule 28(d), Fed.R.App.P.

versed as excessive the District Court's initial fee award of $1.5 million which was based on a percentage of the $10 million settlement fund.[2] *Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380 (S.D.N.Y. 1972) (A608-A617).

In *Grinnell I*, this matter was remanded for an evidentiary hearing, and new guidelines were promulgated governing attorneys' fee awards which placed primary reliance on the value of the time actually expended by the fee applicants as determined by applying normal billing rates. After certain limited proceedings held on remand, on April 28, 1976 a second final judgment (A1181-A1183)[3] from which this appeal is taken was entered awarding Petitioner fees of $870,607.00. This second fee award provides compensation at a "mixed hourly rate" of approximately $250 per hour,[4] assuming that the time claimed on this case had been substantiated with acceptable evidentiary proofs.

Objectors vigorously opposed Petitioner's fee application in the District Court (A332-A384; A503-A504; A557-A558), and appealed from the first judgment awarding fees entered on January 26, 1973 (A618-A620). Although Objectors were the appellants in the first appeal from that judgment which resulted in the reversal of the initial fee

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[2] In *Grinnell I*, *supra*, this Court also disposed of certain issues raised in an appeal taken by appellants other than Objectors relating to the adequacy and fairness of the settlement. Objectors did not oppose the approval of the settlement, and these issues are not involved in this appeal. Accordingly, only the introductory portions of *Grinnell I* and those portions specifically addressing the fee issue have been set forth in the Addendum to this brief which, for the Court's convenience, contains relevant excerpts from its decision disposing of the first appeal taken by Objectors.

[3] All "A" references refer to the two-volume Appendix being filed herewith.

[4] The term "mixed hourly rate" is used to mean an hourly fee for both senior and junior attorneys' time; thus, if a reasonable fee for a senior attorney's time is $100 per hour, and $50 for a junior attorney's time, the mixed hourly fee would be $75 per hour, assuming both expended an equal amount of time on the matter. *See, Philadelphia* v. *Chas. Pfizer & Co.*, 345 F. Supp. 454, 485 (S.D.N.Y. 1972); *Trans World Airlines, Inc.*, v. *Hughes*, 312 F. Supp. 478, 484 (S.D.N.Y. 1970), *modified on other grounds*, 409 U.S. 363 (1973).

award,[5] and actively participated in the remand proceedings (A740-A767; A768-A769), the District Court failed to notify Objectors of the second fee decision of April 21, 1976, which is challenged in this appeal. *Detroit* v. *Grinnell Corp.*, F. Supp. , 1976-1 Trade Cas. ¶ 60,913 (S.D.N.Y. 1976)[6] (A1165-A1175). That decision had awarded Petitioner fees of $717,817, but on April 26, 1976, without notice to Objectors, the District Court amended its prior decision and increased Petitioner's fees by $152,790 (A1180) for a final award of $870,607 (A1182). Also without notice to Objectors that the matter had been decided earlier, on April 27, 1976, the District Court signed a final judgment tendered *ex parte* by Petitioner's counsel.

THE ISSUE PRESENTED FOR REVIEW

Whether the District Court failed to follow the mandate of this Court and the law of the case established in *Grinnell I*, erred as a matter of law, abused its discretion, and made clearly erroneous findings contrary to the record evidence, in awarding Petitioner attorneys' fees of $870,607 from the class' settlement proceeds.

STATEMENT OF THE CASE

The background of this case was set forth fully in *Grinnell I* in the unanimous decision rendered by the panel composed of Circuit Judges Moore and Hays and District Judge Bryan (sitting by designation). Nonetheless, a synopsis of the salient features of this non-litigated, settled case is an essential framework in which to evaluate the propriety of the District Court's second fee award.

1. The Nature of the Case

The fee award challenged in this appeal was made in three companion private antitrust suits brought under

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[5] See note 2, page 2, *supra*.

[6] Because the slip opinion did not lend itself to high quality reproduction, a copy of the decision as unofficially reported is also reproduced in the Appendix (A1176-A1179).

Section 4 of the Clayton Act, 15 U.S.C. § 15, and settled as class actions pursuant to an agreement with the defendants (A56). *After* settlement, Petitioner became Counsel for the Class Representatives by virtue of the District Court's entry of Settlement Order No. 1 (A47). Settlement Order No. 1 also contained certain notice and claim provisions pursuant to which Objectors filed sworn statements of claims and thereby became members of the settlement class (A69-A70).

(a) The Government's case paved the way

This litigation had a "common genesis", *In re Protection Devices,* 295 F. Supp. 39 (J.P.M.L. 1968), in the Government's injunctive action, *United States* v. *Grinnell Corp., et al.,* Civil Action No. 8785 (D. R.I. 1961), brought against Grinnell Corporation ("Grinnell"), American District Telegraph Company ("ADT"), Holmes Electric Company ("Holmes"), and Automatic Fire Alarm Company ("AFA"). Defendants ADT, AFA and Holmes provided "central station protection services" against the hazards of loss by burglary or fire. "Central stations" were maintained in various cities throughout the country where the alarm devices installed by ADT, AFA and Holmes on the protected premises were monitored. Grinnell was formerly the majority stockholder of ADT, AFA and Holmes. *Grinnell I, supra,* 495 F.2d at 452-453.

The Government's case was extensively pretried. *United States* v. *Grinnell Corp.,* 236 F. Supp. 244, 246 (D. R.I. 1964). At trial, the Government relied *exclusively* on exhibits and other documentary evidence (including excerpts from deposition transcripts) and concluded its case without calling any witnesses.[7] In *United States* v. *Grinnell*

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[7] Over one hundred and twenty-five depositions were taken in the Government's case. 236 F. Supp. at 246. In addition to pre-trial discovery, hundreds of additional documents were produced by the defendants and nine additional depositions of the defendants' principal officers were taken in connection with the relief hearings. (Memorandum on Behalf of All Defendants in Support of the Proposed Settlement, at 4, dated May 22, 1972, hereinafter referred to as "Defendants' Memorandum.")

Corp., 384 U.S. 563 (1966), the Supreme Court held that the defendants had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. On July 11, 1967, Judge Wyzanski entered a final judgment granting the Government relief.

(b) The treble-damage actions

Following the Government's success, "a slew of private actions were then instituted seeking treble damages from the four defendants," 356 F.Supp. at 1383. Petitioner filed actions in the Eastern District of Pennsylvania on behalf of a "government class", *City of Detroit, et al.* v. *Grinnell, et al.* (68 Civ. 4026), on behalf of a "commercial class", *1225 Vine Street Building, et al.* v. *Grinnell, et al.* (68 Civ. 4027), and on behalf of an "industrial class", *Manhattan-Ward, Inc., et al.* v. *Grinnell, et al.* (68 Civ. 4028) (A78). Petitioner's three suits, but three of approximately 85 private actions commenced beginning in 1966, were filed on July 10 and 11, 1968, the last of which was *one year to the day following the final order in the Government's case, and seven years after the Government commenced its action.*

On October 3, 1968, the Judicial Panel on Multidistrict Litigation transferred these and other cases to the Southern District of New York. *In re Protection Devices and Equipment*, 295 F. Supp. 39. Additional cases were subsequently transferred. *In re Protection Devices*, 295 F. Supp. 622 (J.P.M.L. 1968). In all, 84 related cases were assigned to Judge Metzner for coordinated pretrial proceedings. 356 F.Supp. at 1383-1384.

(c) The settlement of these class actions

In August 1971, Petitioner and the defendants agreed to a $10 million settlement of all claims which might arise out of these three suits (A55-A61). The settlement offer was contingent upon the Court affording class action treatment under Rule 23 (A56).

Prior to reaching settlement, the class issue had been briefed and argued, but Petitioner and counsel for the de-

fendants asked the District Court not to decide the question because of ongoing settlement negotiations (A577-A578). In fact, Petitioner testified on remand that upon leaving the courtroom following argument on class certification, he stated to defense counsel, "don't you think we ought to really sit down and try to work this out" (A851). After four meetings with defense counsel, the $10 million settlement was reached (A851).

Throughout these proceedings, Objectors have not opposed approval of the settlement. However, the relatively little effort expended by Petitioner on this case in general,[8] and particularly in negotiating the settlement (51½ hours),[9] is relevant in evaluating the services rendered and the amount of fees which a court of equity could fairly and reasonably assess against the unrepresented class members. Similarly, the alleged benefit conferred on the class by Petitioner's purported efforts is relevant in evaluating the so-called "quality" of counsel's services.

2. The Prior Dispositions

A brief portrayal of the prior dispositions in this matter is also essential to a review of the propriety of the second fee decision from which this appeal was taken.

(a) The first disposition below

(i) *The First Fee Proceedings*

Settlement Order No. 1 provided for the filing of applications for attorneys' fees (A53), and for class members to file objections (A53-A54). Objectors timely opposed the fee applications (A332-A384), and filed the prescribed Notice of Intention to Appear (A331) at the fee hearing.[10]

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[8] Half of the total time claimed by Petitioner's office was for routine "settlement procedures" and "settlement administration" (A1178).

[9] P. Exh. A., in evid. (A972)—At the evidentiary hearing, the exhibits offered by Petitioner were marked as "Plaintiff's Exhibits" (A869); in this brief, they will be cited as "P. Exh.".

[10] Rule 23(c)(2)(C), Fed.R.Civ.P., specifically provides that class members may appear through their own counsel.

Other claimants also objected to the fees sought below as excessive (A227; A308; A318; A319; A324).[11]

Because of the dearth of facts and the conflicts relating to the alleged services performed in the class' behalf, Objectors filed a motion for "an evidentiary hearing on the issues raised by the fee petition of Counsel for the Temporary Class Representatives" (A326-A330). Paragraph 6 of the Court's Legal Notice sent to all prospective class members specifically provided that at the final hearing, a class member could object to the fee petitions and "may present . . . evidence" (A80).[12] Nonetheless, Objectors' request for the evidentiary hearing provided for by the Court's own notice was denied (A20; A557-A558; April 10, 1975, tr. at 3), and it entertained oral argument only on the fee applications (A557-A558).

Petitioner's fee application (A101) sought an award of 25% of the settlement proceeds, or a mixed hourly fee in excess of $1,000 per hour. Based on his supporting affidavit (A103), Petitioner's major "litigating" efforts amounted to filing three complaints, preparing three briefs, making three court appearances, and undertaking the routine tasks incidental to administration of the claims procedure and distribution of the settlement proceeds.

Petitioner's embellishment of the legal services which he claims he performed is aptly illustrated by the description of his class action papers, one of the few issues which he briefed:

> Petitioner initially submitted an extensive brief (46 pages) in support of the class action. . . . Petitioner then filed an extensive reply brief (40 pages) in addition to Petitioner's affidavit (Petitioner's Aff. ¶ 13; A110).

Ironically, in his attempt to support his petition for fees—an exercise wholly antagonistic to the class' interest out of

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11 Several other class members sent letters to Judge Metzner opposing the fee allowance sought by Petitioner.

12 This provision was in accordance with the requirements of Rule 11B of the District Court's Local Rules.

whose settlement proceeds any fee award will be deducted —his briefs were 69 and 43 pages and his affidavit 29 pages, more than 50% weightier than his class action papers.

Of special interest, Petitioner's Memorandum Of Counsel for the Class Representatives in Support of Their (sic) Petition for Counsel Fees and Costs (A140) was filed *pro se*. However, although he negotiated in behalf of the class in settling this case, it appears that he subsequently found a need for assistance in presenting his fee application. After the filing of objections to Petitioner's fee application, he hired former Attorney General Herbert Brownell (A391) to appear for him at the fee hearings before Judge Metzner.

The Honorable Simon H. Rifkind, speaking for certain class members (not parties to this appeal) in opposition to Petitioner's fee application commented at the fee argument:

> Apparently, . . . Mr. Berger must feel that he has . . . a real problem on his hands because normally. . . counsel who represent plaintiffs in derivative suits or in class suits, . . . come in and present their own application. It is only in the uncommon case that they come in aided by counsel to present their application.
>
> When in this case they come to court assisted by such luminaries of the bar . . . I suspect that Mr. Berger is aware of the fact that he has a very heavy burden to carry. . . . (June 5, 1972, hearing, tr. at 25 and 26).

In addition to Petitioner's application, other fee petitions were filed. The three firms of (a) Weil, Gotshal & Manges, (b) Liebman, Eulau, Robinson & Perlman, and (c) Parker, Chapin & Flattau, which constituted a so-called "Troika", and Wald, Harkrader & Ross petitioned for a portion of any fee awarded to Petitioner on the ground that their efforts in the pretrial proceedings in behalf of retained clients in other cases benefited the class members whose interests Petitioner purportedly represented.

(ii) *The First Fee Decision*

On December 27, 1972, the District Court awarded Petitioner fees of $1.5 million (A574), a mixed hourly rate of $635 since Petitioner then claimed that 2,357 hours of legal services were expended on this case (A125).[13] In making the fee award of $1.5 million out of the class members' settlement fund, the Court noted that of "some 6,200 hours spent on this litigation by senior and junior attorneys in his law firm and paraprofessionals . . . half of the time spent is referable to paraprofessionals" (A596-A597). Nonetheless, the Court adopted a contingent fee approach, and awarded Petitioner 15% of the class' settlement proceeds.

The District Court also held that other fee applicants who had benefited the class were entitled to compensation (A606).

(b) This court's disposition of the first appeal

Adhering to and quoting verbatim key holdings of the landmark decision in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973) (*"Lindy I"*), *decision on remand*, 382 F. Supp 999 (E.D. Pa. 1974), *vacated and remanded en banc*, —— F.2d ——, Docket No. 74-2189 (3rd Cir., July 2, 1976), (*"Lindy II"*), this Court in *Grinnell I* reversed the inital fee decision and remanded for an evidentiary hearing. The Court held that the District Court's $1.5 million fee award "was excessive and displayed too much reliance upon the contingent fee syndrome". *Id.* at 468.

Significantly, *Grinnell I* noted that the practices surrounding the award of attorneys' fees had proved embarrassing to the courts, and laid down the following admonition:

> This embarrassment is rooted in the fact that 'the bitterest complaints [about the legal profession] from laymen [are directed at] the windfall fees and feather-

[13] In the second fee proceeding, Petitioner claimed 3,578 hours (A1178), or *an additional 1,221 hours*, even though the settlement was agreed to by Petitioner five years ago.

> bedding that lawyers have managed to perpetuate through . . . their influence with the judiciary'. *Id.* at 469.
>
> [I]t is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in *Trustees* v. *Greenough* [105 U.S. 527, 536 (1881)] when it advised that fee awards under the equitable fund doctrine were proper only 'if made with moderation and a jealous regard to the rights of those who are interested in the fund'. . . . The award must be made with an eye to moderation. . . . *Id.* at 469-470.

Following *Lindy I*—which the Third Circuit sitting *en banc* reaffirmed in *Lindy II*—this Court held that the starting point in any fee determination "must be a calculation of the attorney's services in terms of the time he has expended on the case." 495 F.2d at 470. "Anchoring the analysis to this [time] concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts." *Id.*

Thus, *Grinnell* I held that on remand the number of hours claimed by Petitioner must be broken out with "some fairly definite information as to the way in which that time was spent (discovery, oral argument, negotiation, etc.) and by whom. . . ." *Id.* at 471. The District Court must then apply "normal billing rates" to those hours to determine the fair value of Petitioner's services. The Court emphasized that a determination of the basic fee to which an attorney would be entitled on an hourly basis is an essential prequisite to any fee award: "[W]e are convinced that this simple mathematical exercise is the only legitimate starting point for analysis." *Id.* at 471.

After the petitioning attorney's fee is determined on an hourly basis, "less objective factors" might be considered, the "foremost" of which is "the attorney's 'risk of litigation' " which includes "the probability of success, of either ultimate victory on the merits *or of settlement.*" *Id.* Al-

though, the Court recognized in *Grinnell I* that factors such as the quality of the services rendered could possibly affect the fee award, *this factor is primarily accounted for by the varying hourly rates for each attorney depending upon his status at the bar and experience.* Moreover, the Court unequivocally stated that it was "minimizing" the role traditionally played by the magnitude of the recovery in determining fee awards. *Id.* [14]

Further, an increase or decrease in the fee determined on an hourly basis is permissible only when an adjustment can be supported by specific factual findings. Quoting from *Lindy I* verbatim, this Court held: " '[I]n increasing or decreasing an attorney's compensation, the district judge should set forth as specifically as possible the facts that support his conclusion. . . .' " *Id.* at 473. Thus, *Grinnell I* imposed upon the District Court the burden to articulate with particularity facts justifying any modification of its "lodestar" determination—as it was termed in *Lindy I.*

(c) The second disposition below

(i) *The Proceedings Following Remand*

Following this Court's remand in *Grinnell I* on March 13, 1974, the District Court notified the parties that prehearing submissions in this matter should be filed by October 31, 1975, and set a hearing for November 10, 1975 (A1163). The District Court summarily rejected (A1163) Objector's contention (A1161) that notice of the hearing should be provided to *all* class members, even though Petitioner sought fees for certain matters (such as time claimed for prosecuting his fee application) which was wholly antagonistic to the class' interest.

Despite Petitioner's burden to demonstrate with factual proofs the reasonableness of the fees sought and to estab-

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[14] This point was explicitly conceded by Petitioner in his Petition Of Counsel For Class Representatives-Appellee For Rehearing And Suggestion For Rehearing En Banc (hereinafter "Petition For Rehearing"), filed after the panel's decision in *Grinnell I.* The Petition for Rehearing was denied by this Court on May 3, 1974.

lish an evidentiary basis for any fee award, Petitioner's proffers at the hearing held on remand were primarily limited to identifying previously-filed affidavits (A876; A980; A999;[15] A1001; A1030). Petitioner's limited submissions did not support the claims made in support of his original fee petition (A101). To the contrary, despite the law of this Circuit, Petitioner relied on "reconstructed" time claims. Further, he offered *no* independent or corroborative evidence of the self-serving claims made in his own behalf. Hence, because of the dearth of record support for the claims made in Petitioner's fee application, the District Court was unable to comply with the law of the case laid down in *Grinnell I*.

(ii) *The Second Fee Decision*

The brief ten-page decision assessing fees of almost $900,000 against the unrepresented class members is wholly conclusory in nature. No specific factual findings were made justifying the District Court's increase of the fee determined on an hourly basis by 200 percent for most categories of activities. In fact, although this Court's remand decision required the District Court to articulate with particularity the factual findings upon which the second fee award was based, the second conclusory fee decision (A1176-A1179) is as brief as the initial fee decision reversed by this Court in *Grinnell I* (A614-A617).

The District Court recognized on remand that *Grinnell I* and *Lindy I* "plowed new ground in the area of the termining the amount of fees to be awarded . . . in class actions" (A1177). However, the District Court then proceeded to ignore the law of the case established in *Grinnell I*.

The District Court noted that Petitioner "has admitted that for certain periods, there are no time records available" (A1177). Nonetheless, the District Court in summary, unsupported fashion concluded that "records were

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[15] This affidavit, made on information and belief, was not admitted into evidence (A869).

reconstructed . . . based on proceedings that took place in the litigation" (A1177).

The District Court noted "counsel's success in numerous other large class action law suits" (A1177), but made no findings as to which—if any—lawsuits Petitioner has been successful in, or what relevance they would have in evaluating Petitioner's services in this case. Without making the factual findings required by *Grinnell I* as to *any* particular activity or category of legal services rendered by Petitioner, the District Court summarily concluded: "His work in this case demonstrated a high degree of skill" (A1177). This statement was at odds with the District Court's own sentiments expressed in its first fee decision in which it ruled that counsel other than Petitioner had standing to apply for a portion of the fee awarded to him because their work in companion cases had benefited the class whom he purportedly represented (A617).

The District Court in arriving at its "lodestar" determination fixed an hourly rate of $125 for Petitioner and $100 for the two attorneys in his office who claimed the most time on this case. These high hourly rates more than generously compensate Petitioner for his claimed services in this case, particularly since those rates were applied to time claims expended primarily in the late 1960's and early 1970's.

Nonetheless, the District Court increased those rates by 200 percent in making its ultimate fee award, and concluded without making the requisite specific factual findings:

> The complexity of the issues presented in this litigation, the competence with which they were presented, the success achieved, and most importantly, the risk of litigation merit multiplying by 3 the basic fees . . . . (A1178).

For approximately 1,350 hours spent on the routine task of settlement administration, the District Court increased the hourly fee by twice the basic rate. For the fees ex-

pended by Petitioner in preparing and presenting his fee application, fees were awarded at the hourly rate even though that work was wholly antagonistic to the class' interest.

In summary, despite the inadequacy of Petitioner's time records, Petitioner was awarded fees from the class settlement fund which approximate three times the very generous fees determined on an hourly basis. Using the 2,350 hours claimed by Petitioner at the time that his fee application was filed (A125), the almost $900,000 awarded on remand would compensate him at a "mixed hourly rate" of approximately $375.

STATEMENT OF THE FACTS

There are few basic facts of record relevant to the disposition of this appeal.

Although Petitioner testified in the remand proceedings that he first learned of the mammoth Government case "some time during the period of 1960" (A834), he waited until one year after the entry of the final decree to file his complaints. In fact, the Supreme Court decision in *Grinnell, supra,* was handed down more than two years prior to the filing of these class actions.

In its first fee decision, the District Court commented:

> [T]he existence of this number of individual suits, many instituted more than a year prior to these class actions, somewhat diminishes credit to counsel for having the foresight to bring the suits (A599).

In fact, the undisputed origin of Petitioner's class actions was a chance meeting between an attorney for one of the other plaintiffs and an associate of Petitioner's (Obj. Exh. A, in evid., A1177). Petitioner did not draft the complaints he filed, but rather (with minor exceptions relating to the inclusion of class allegations), they are "picture copies" of a complaint previously filed and forwarded to him (Obj. Exh. A, in evid., A1129).[16] At the

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[16] The exhibits offered by Objectors at the hearing, A through F, were incorrectly marked in the transcript (A103). In this brief, they will be cited as "Obj. Exh.".

evidentiary hearing held on remand, Petitioner could not deny that his complaints were basically xerox copies of that complaint: "I would say the materials if you compared them are probably so" (A840).

Subsequent to the commencement of these suits, Petitioner expended little effort in their prosecution. The legal services detailed in his affidavit which Petitioner claims were rendered in the class' behalf were as follows:[17] (a) drafting a motion for the production of documents and reviewing joint interrogatories prepared by others (A106); (b) reviewing and analyzing the Government's record and "inspection" of the document depository (A106); (c) preparing a draft opposition to the defendants' summary judgment motion (A107);[18] (d) participating in the preparation of briefs pertaining thereto and joining in arguing the appeal in this Court (A108); (e) moving to amend the complaint (A108); (f) negotiating the settlement (A111-A112); and (h) administering the settlement (A112). Incredulously, these few efforts purportedly consumed 3,600 hours of attorneys' time (A1178), or approximately two man-years for which Petitioner was awarded almost $900,000.

Petitioner did not claim that even one deposition was taken, or that one piece of paper was produced by the defendants in response to any discovery which he independently initiated. In the evidentiary hearing held on remand, Petitioner's testimony revealed that he did not even know that depositions had been taken by counsel for other subscriber plaintiffs (A845), and he admitted that he never visited the Government's document depository, nor did he know how much time was spent there by others in his office (A845-A846).

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17 These claims were materially controverted and Petitioner's claimed contributions substantially deprecated by other plaintiffs' counsel in sworn affidavits (A246; A260; A290).

18 The reported decision in the District Court, *Russ Togs, Inc.* v. *Grinnell Corporation*, 304 F. Supp. 279 (S.D.N.Y. 1969), *aff'd*, 426 F.2d 850 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970), does not list Petitioner among counsel who appeared.

In its decision approving settlement and making the first fee award, the District Court commented that discovery in the private case was "huge":

> It consists of everything that was produced in the government suit . . ., documents produced and depositions of the defendants taken in the *Sentinel* case . . ., and the tremendous amount of information furnished to subscriber plaintiffs in the consolidated pretrial proceedings in this court. One interrogatory alone, propounded by the Troika [not by Petitioner] required 3,000 pages for its answer (A582).

This was discovery which the District Court found was *undertaken by counsel other than Petitioner.* In its second fee decision, the District Court made *no factual findings* as to any discovery or any other pre-settlement services rendered by Petitioner in the class' behalf.

According to Petitioner's own testimony on remand, simultaneously with the completion of argument on the class action issue, he attempted to settle this case (A851). Although it is uncontroverted that it is "not uncommon" for attorneys in his office to claim 16- to 20-hour days (A813), the total amount of time which was "reconstructed" for Petitioner's efforts on settlement negotiations was 51½ hours (P. Exh. 1, in evid. A972), and this included "travel time" from Philadelphia to New York (A785). Moreover, because Petitioner admittedly did not keep time records, time claimed for him was "reconstructed" by another member of his office (A861). Petitioner's affidavit verifying on information and belief the time claims made in his behalf (A999) was not admitted into evidence at the hearing held in the remand proceedings (P. Exh. 3, for identification; A864).

Petitioner's office spent approximately ten times more hours on "settlement procedures" and "settlement administration" than on discovery (A971). Also, approximately only 30 hours were claimed by Petitioner's entire office for pleadings and motions (A971). Petitioner himself claims that approximately 50% as much time was devoted to his

fee petition than to settlement negotiations, even though he retained General Brownell to represent him on the fee matter (A972-A973). Petitioner claimed more than twice as much time on his fee application than on discovery (A971; A973).

Despite Petitioner's claims to the contrary, the $10 million settlement in this case was not exceptional, and does not warrant an increase in Petitioner's fees over and above those determined on an hourly basis. According to the defendants' estimate, total purchases of their services approximated $800 million (Defendants' Memorandum, p. 11). Although Petitioner's settlement on behalf of the class resulted in a recovery of approximately 3.5 percent of purchases (A510), non-class subscriber plaintiffs subsequently received settlement offers which *averaged* 15 percent of purchases (Obj. Exh. F, in evid. A1164).

Finally, despite Petitioner's self-serving claims, he admitted in the evidentiary hearing held on remand that he has never tried a class action (A857). Further, he admitted that he has not tried any antitrust jury case in the past decade (A859-A860).

ARGUMENT

Although as Counsel for the Class Representatives, Petitioner is purportedly the spokesman for all class members, only Objectors' views on the fee issue are consistent with the class members' interests. Petitioner's fee application was directly antagonistic to the interest of the class which he is disqualified from representing on this issue. Previously, in virtually all class action settlements, fee awards had not been determined in an adversary or "litigated" context, and the class' interest was unrepresented.

But for Objectors' appeal, the first excessive fee award made below would have been deducted from the settlement proceeds to the detriment of the class in this case. However, the prior appeal raised issues of first impression in

this Court, and *Grinnell I* established new principles governing fee awards in this Circuit. On remand, the District Court did not adhere to this Court's mandate, and made a second excessive fee award from which this appeal was taken.

I.

THE STANDARD AND SCOPE OF REVIEW

In remanding for an evidentiary hearing in *Grinnell I*, this Court held that any modification of the fee arrived at on an hourly basis in the District Court's "lodestar" determination must be supported by specific findings of fact:

> '[I]n increasing or decreasing an attorney's compensation, the district judge should set forth as specifically as possible the facts that support his conclusion. . . .' 495 F.2d at 473.

In *Merola* v. *Atlantic Richfield Co.*, 493 F.2d 292, 295 (3rd Cir. 1974), which remanded for further consideration in light of *Lindy I*, the Court commented on the scope of review of the abuse of discretion standard traditionally applied in fee matters:

> Where a District Court errs as a matter of law by utilizing improper standards or procedures in determining fees, an abuse of discretion occurs. . . . Similarly, clearly erroneous findings of fact require reversal. (Citations omitted.)

Thus, the clearly erroneous standard applies to a review of any factual findings made below, and the abuse of discretion standard applies to a review of the District Court's application of the new fee rules promulgated in *Grinnell I* to the facts properly found and supported by the limited record established at the evidentiary hearing. In *Lindy I*, Chief Judge Seitz stated that a "failure to adhere to proper standards . . . would constitute abuse of the District Court's discretion to award attorneys' fees." 487 F.2d at 166.

The District Court's failure below to follow the standards promulgated in *Grinnell I* and to set forth with particularity the factual findings required by that decision

constitutes reversible error. *Grinnell I* was not just persuasive authority that should have been followed on remand, it was the controlling law of the case. In *Ratay* v. *Lincoln National Life Insurance Company,* 405 F.2d 286, 288 (3rd Cir. 1968), the Court stated: "[A] trial court must comply strictly with the mandate directed to it by the reviewing court." More recently, in *United States ex rel. Greenhalgh* v. *F. D. Rich Co., Inc.,* 520 F.2d 886, 889 (9th Cir. 1975), it was held: "The trial court had no power to deviate from this court's mandate."

Grinnell I is also the law of the case governing disposition of the present appeal.[19] *Lehrman* v. *Gulf Oil Corp.,* 500, F.2d 659, 662-663 (5th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975). In *Antonioli* v. *Lehigh Coal and Navigation Company,* 451 F.2d 1171, 1178 (3rd Cir. 1971), the Court of Appeals held that it was "bound under the doctrine of the law of the case by the court's prior decision," and quoted the following from an earlier opinion:

> 'The former decision of this court became the law of the case and, once the law of a case is settled by an appellate court, it is settled for that tribunal as well as for the trial court. . . .'

Accordingly, the District Court's failure to follow on remand the law of the case established in this Court's prior decision requires that the second fee award be set aside.

II.

THE SECOND FEE AWARD IS EXCESSIVE

As demonstrated *infra,* the District Court committed error in making its "lodestar" determination. In addition, it compounded that error in geometric proportions by multiplying by three the fee found to constitute reasonable compensation on an hourly basis for most categories of Petitioner's claimed services. Although it increased Petitioner's fees by several hundred percent, the District Court

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[19] The Petition For Rehearing filed by Petitioner was denied.

simply ignored the law of the case set forth in *Grinnell I* and did not support by any factual findings its conclusory holding assessing these enormous fees against the class' settlement fund. Finally, the District Court entertained a hearing at which Petitioner introduced exhibits of his "reconstructed" time, but ignored the fact that this matter was remanded for the specific purpose of establishing a record in which the requisite *factual findings* were to be grounded.

A. The Court Taxed the Class with Enormous "Windfall Fees" For Petitioner

Lindy I, relied on so heavily in *Grinnell I*, emphasized that the sole purpose of a fee award is "to compensate the attorney for the reasonable value of services." 487 F.2d at 167. This Court in *Grinnell I* stated "the court's role in equity is to provide just compensation for the attorney," and therefore held: "The award must be made with an eye to moderation. . . ." 495 F.2d at 470. *Grinnell I* also relied on *Wewoka, Okla.* v. *Banker*, 117 F.2d 839, 841 (10th Cir. 1941), in which Judge Murrah commented on the equitable fund theory doctrine laid down in *Greenough, supra*, and its progeny, and warned: "The power of the Court is capable of abuse and should be exercised with caution and regard to the rights of litigants."

Relying on both *Grinnell I* and *Lindy I*, in *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975), which also reversed a fee award to Petitioner, the Court recently stated: "Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of the absent class members." In another settled class action, Judge Will in *Liebman* v. *Peterson Coal & Oil Co.*, 63 F.R.D. 684, 701 (N.D. Ill. 1974) relied on *Grinnell I* and *Lindy I*, and his pertinent comments merit quotation at length:

> The principal attacks on the rule are largely the result of conduct by counsel for plaintiffs in some cases who have acted as though the rule was adopted for their benefit rather than for the multitude of individuals

comprising the class or classes whose rights they were presumably vindicating. Quick, cheap settlements, conflicting representation of more than one class, side deals for the payment by defendants of plaintiffs' counsels' fees, exorbitant fees, misuse or abuse of the class action, etc., have brought justifiable criticism of Rule 23 in action. 63 F.R.D. at 701.

In similar vein, more than a generation ago in *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846, 859 (8th Cir. 1952), the Court wrote: "[I]t is the duty of appellate courts to protect against 'vicarious generosity' in the matter of attorney fees." Likewise, in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561, 570 (7th Cir. 1951), Chief Judge Major warned that "the possibility that the antitrust laws might develop into a racketeering practice should not be enhanced by the allowance of exorbitant . . . attorney fees." Those cases had been litigated to judgment, and the fees were to be assessed against the defendants, a deterrent to antitrust violations. *Farmington Dowel Products Co.* v. *Forster MFG Co.*, 421 F.2d 61, 90 (1st Cir. 1970).

In a settled class action where the fees are to be impressed on the shares of the unrepresented class members, a court of equity should be particularly vigilant to avoid awarding "windfall fees" as this Court specifically warned in *Grinnell I*:

> For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding windfall fees and that they should likewise avoid every appearance of having done so. 495 F.2d at 469.

In addition to making meaningful review on appeal possible, the requirement that the District Court articulate with particularity the facts justifying its increase in the fee determined on an hourly basis will tend to accomplish the end that even the "appearance" of an award of "windfall fees" should be avoided. This requirement of specific findings of fact not only acts as a restraint on the trial judge, but enables interested class members to make full

scrutiny of the factors underlying any fee award assessed against their interests in the settlement fund.

The District Court's unsupported conclusion that Petitioner's hourly fees should be increased by several hundred percent ignores the fact that *the hourly fee alone adequately rewards a fee applicant.* In *Lindy I,* the Court warned:

> In making allowance for the quality of work, the court must keep in mind that the attorney will receive an otherwise reasonable compensation for his time under the figure arrived at from the hourly rate. 487 F.2d at 168.

Hence, this Court held in *Grinnell I* that in determining a reasonable fee, the District Court should start with the premise that "[t]he value of an attorney's time generally is reflected in his normal billing rates." 495 F.2d at 473. Those rates take into account the experience and competence of the attorney.

Here, the Court fixed the very generous hourly rate of $125 for Petitioner himself, and $100 per hour for two "senior" attorneys who claimed time on this case; both were admitted to practice *less* than ten years prior to the expenditure of most of their time. Because these high hourly rates were at the top of the scale of rates which attorneys of comparable experience could charge, the class had a right to expect very high quality legal services for the fee determined on an hourly basis in the "lodestar" determination. This is especially so in view of the excessive number of hours which attorneys in Petitioner's office testified it was not unusual for them to claim in any one day, and the lack of contemporaneous time records to support the claims of 15 to 20 hour days on this and other cases.

Moreover, the arbitrariness of trebling Petitioner's compensation on an hourly basis is exemplified by a brief analysis of the components of an attorney's hourly fee: Every attorney incurs overhead costs which are not reimbursable as out-of-pocket expenses; part of every "normal billing rate" includes a charge for overhead, and only a

portion of an hourly fee actually compensates the attorney; hence, applying that multiplier to the "lodestar" figure would reward the attorney threefold not only for his services, but also for his overhead. Since Petitioner's overhead costs were not increased threefold in this case, he is in effect receiving net compensation for his time far greater than three times his normal hourly rate. Assuming overhead charges of 40 percent, applying a multiplier of three to an hourly rate results in an award *five* times the income which he would receive from his hourly rate.

Lindy I also held that an increase in the fee over and above that determined to constitute reasonable compensation on an hourly basis varies from case to case but generally "will bear a reasonable relationship to the aggregate hourly compensation." 487 F.2d at 169. In this case, there is no "reasonable relationship" of the almost $900,000 awarded by the District Court to the fee determined on an hourly basis, and no attempt was even made by the District Court to explain how or why it arrived at a multiplier of three. The inherent unsoundness of the District Court's summary conclusion that Petitioner's hourly fee should be increased by a multiple of three is aptly illustrated by the separate opinion of Judge Gibbons, joined in by Chief Judge Seitz, in *Lindy II:*

> The question, . . . is whether a valuation of the contingency and quality factors in this case at one hundred percent of the reasonable value of the services performed bears a reasonable or a totally unreasonable relationship to that value. It seems clear to me that the district court . . . arbitrarily selected a multiplication factor of one hundred per cent without really analyzing the factors which in *Lindy Brothers I* we said should govern disposition of the fee question. . . . Such appellate deference to an arbitrary and unexplained selection of a one hundred per cent quality and contingency factor is the seed which may bear fruit in the undermining of the significant advance in the law which *Lindy Brothers I* heralded. For if the district courts can pull contingency and quality multipliers out of thin air, calculating the reasonable value of an attorney's time as a measure of the quantum meruit

> for his services to unrepresented class members will soon become a meaningless rite. Slip op. at 41. (Footnotes omitted.)

Clearly, the Court below taxed the unrepresented class members with excessive fees and awarded Petitioner "windfall fees" in direct violation of the mandate of *Grinnell I*.

B. The So-Called "Contingency" and "Quality" Factors

In *Grinnell I*, this Court held that after determining a fee on an hourly basis, "less objective factors" can be introduced into the fee "calculus," and "perhaps the foremost of these factors is the attorney's 'risk of litigation' " which was specifically defined as follows:

> The greater the probability of success, of either ultimate victory on the merits *or of settlement*, the less this consideration should serve to amplify the basic hourly fee. The tangible factors which comprise the 'risk of litigation' might be determined by asking the following questions: has a relevant government action been instituted or, perhaps, even successfully concluded against the defendant; have related civil actions already been instituted by others; and are the issues novel and complex or straightforward and well worn? 495 F.2d at 471. (Emphasis supplied.)

Each of those factors here were adverse to Petitioner's claim for enormous fees from the fund which represents only a partial recoupment for the class' injury flowing from the defendants' violation of the antitrust laws proven *by the Government* in its earlier case. Nonetheless, the District Court erroneously concluded that the Government's *Grinnell* case was not beneficial to Petitioner, and that "counsel was starting from scratch in this litigation" (A1177). This finding was clearly erroneous and ignored the practicalities of litigation of this nature and *the probability of settlement* which *Grinnell I* specifically held mitigates the "risk of litigation" factor.

Unquestionably, the Government did pave the way in this litigation. For example, Petitioner undertook very little discovery, and benefited materially from the Govern-

ment's efforts. Petitioner's entire office claims but 173 hours for discovery (A1178)—approximately one attorney's billable time for one month—in a case pending for years. On the other hand, the Government through its discovery efforts collected an enormous amount of documents which were made available to the plaintiffs as the District Court noted in its initial fee decision (A610). Thus, the District Court's unsupported, conclusory finding that "counsel was starting from scratch" was inconsistent with its own earlier decision. Further, on cross examination in the evidentiary hearing held on remand, Petitioner claimed that persons from his office inspected the Government's depository, and that he reviewed an analysis of the record in the Government's case (A846). The District Court's holding in its second fee decision is at odds even with Petitioner's own fee application in which credit is claimed for reviewing the documents assembled by the Government (A106).

The Government's case, initiated some seven years prior to Petitioner's actions, was concluded following resolution by the Supreme Court of *Grinnell, supra,* virtually a year to the day prior to the filing of these class actions by Petitioner. Further, there were some 80-plus private civil actions instituted prior to the filing by Petitioner of the instant complaints.

Moreover, in the wake of the Government's case, not only were the issues not "novel or complex," but *no evidence* was introduced by Petitioner at the evidentiary hearing pertaining to any alleged novelty or complexity. Thus, the District Court did not and could not make any factual findings on this issue based on the record. To the contrary, the District Court merely concluded in summary fashion:

> I would say that the issues here are novel and complex, and again refer to the details set forth in 356 F. Supp. 1380 [decided prior to the evidentiary hearing].

Any question as to whether the issues in this case were "straightforward and well worn" is put to rest by refer-

ence to the class action issue. As pointed out, *supra*, Petitioner's original fee application and supporting affidavit were substantially longer than his class action papers, and Petitioner has admitted that prior to the determination of the class action issue, and on the same day that it was argued, he initiated settlement negotiations with the defendants, and settled the case after four meetings (A851).

Significantly, Harold E. Kohn, Of Counsel to Petitioner below, has testified that cases of this nature are "invariably settled." *Hearings on S. 3201, Before the Senate Committee on the Judiciary*, 91st Cong., 2d Sess., at 110 (1970). More recently, Mr. Kohn testified in the *Lindy Bros.* remand proceedings as follows:

> [T]his type of litigation can practically be conducted only if in the overwhelming number of cases there is a settlement rather than going to trial (June 14, 1974, tr. at 86).

The insignificance of the "contingency" or "risk of litigation" factor in this case, considering the practicalities of litigation of this nature, is put in perspective by the incisive reasoning of Judge Will in *Liebman, supra*:

> With respect to the contingency . . . issues as they relate to these cases, several observations are pertinent. The first is that the element of contingency was not substantial. *Before the civil actions were filed, the State had accumulated substantial evidence against the defendants* . . . It is difficult to find any substantial element of contingency under the circumstances. 63 F.R.D. at 697 (Emphasis supplied.)

Likewise, Judges Gibbons and Seitz in discussing the alleged contingency factor in *Lindy II* concluded that they would find it "difficult, indeed, to articulate a justification for 100% mark-up on this record." Slip op. at 51. Their further persuasive comments are fully applicable here.

> [T]he district court's effort to distinguish away the significance of the factors [*e.g.*, the antecedent Government case] to which Chief Judge Seitz [in *Lindy I*],

discussing contingency, made specific reference is disingenuous. The opinion refers to the uncertainty of the class members' ability to prove liability and damages. . . . Some recovery was virtually certain; what speculative element there was related to the amount, *not the probability,* of potential recovery. (Emphasis supplied.)

* * *

[I]n a case where some recovery is virtually certain, the fact that the total recovery may be uncertain cannot, consistent with the spirit of *Lindy Brothers I,* justify a substantial departure from the lodestar of reasonable value of services computed on a time basis.

* * *

The certifiability of a proposed class action is a contingency factor, certainly. But it is not the kind of contingency to which *Lindy Brothers I* refers. . . . The contingency factor to which *Lindy Brothers I* refers is the probability of success in the lawsuit, not the probability of success in enlarging the class so as to maximize the fee.

Finally, I search in vain for the place in the record where the district court, having considered the relevant criteria bearing on contingency, 'identif[ied] those factors supporting its conclusion, state[d] the specific amount by which the basic fee should be increased due to the contingency of success, and [gave] a brief statement of reasons therefor.' Slip op. at 43-46. (Footnotes omitted.)

In this case, even though the record provides less justification for increasing Petitioner's fee because of the "contingency" factor, the District Court's "mark-up" was virtually 200 percent for all categories of services. In *Lindy,* in which the mark-up was 100 percent, the size of the recovery was virtually three times the recovery in this litigation. Also, the District Court's second fee award is roughly 10% of the $10 million settlement in the *Grinnell* litigation.

Grinnell I further held that an attorney's normal hourly rates provide adequate compensation for the so-called "quality" factor. Thus, this Court stated that it was

"minimizing the role traditionally played by the magnitude of the recovery." 495 F.2d at 471. Petitioner has conceded that this is, in fact, the holding of *Grinnell I*, and that the new *Grinnell I* fee standards give "primacy" to the hourly fee:

> In this panel's opinion, the Court requires district judges when awarding attorneys' fees in private antitrust actions to give primacy to the number of hours expended and typical hourly rates . . . (Petition For Rehearing, at 1).

The facts of this case simply would not justify an increase in the fee determined for Petitioner on an hourly basis because of the result achieved or the quality of Petitioner's claimed services. The incisive comments of Judge Wyatt in *Pfizer, supra,* 345 F. Supp. at 469—a pre-*Grinnell* case—are apropos:

> That Kohn [Petitioner's co-counsel in that case] single-handedly negotiated the $20,000,000 settlement offer with defendants does not, however, suggest a generous treatment of his present petition. . . . [C]ounsel other than Kohn later succeeded in negotiating a far better settlement offer from defendants than Kohn had done.

Similarly, plaintiffs in this case who opted out of the class settlement agreed to by Petitioner subsequently succeeded in obtaining substantially better settlements on behalf of their clients. Objectors' Exhibit F, in evid. (A1164), is an undisputed chart which reflected outstanding offers made to non-settling parties.[20] The settlement offers on that chart made to approximately 30 plaintiffs averaged 15 percent of purchases, whereas the settlement agreed to by Petitioner only represented "a recovery of 3.2% to 3.7% of the total billings of customers who filed claims" (A611). Moreover, only about 14,000 of the defendants' 89,000 customers who received Notice filed claims (A609). If all prospective class members had elected to share in the settle-

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[20] Also, the final settlements received by some of those plaintiffs were in *excess* of the offers contained in Exhibit F.

ment proceeds, the average recovery from the settlement agreed to by Petitioner in the class' behalf would have been nominal. This was an acceptable, but *not* an exceptional settlement which justified awarding Petitioner enormous "windfall fees."

Aside from the fact that this was not an exceptional settlement, the quality of Petitioner's work was questioned by Judge Wyatt in *Pfizer, supra,* 345 F. Supp. at 484, and Petitioner conceded in the evidentiary hearing held on remand that he has never tried a class action (A857), and that he hasn't tried any antitrust jury case within the last decade (A859-A680). Also, other attorneys took issue with the claims made by Petitioner as to his services rendered in furthering the disposition of this case (Obj. Exh. A, in evid., A1095; Obj. Exh. B, in evid., A1104-A1105).

Apparently the District Court also had reservations about Petitioner's contributions in advancing the class' interest. In its initial fee decision, it ruled that a hearing would be held on the claims of these *other* attorneys who claimed that they furthered the class' interest:

> I subscribe to the principle that counsel who contributed to the benefit conferred on the class are entitled to compensation for that effort. 356 F.Supp. at 1393.

In short, there is no basis in the record of the hearing held on remand which justified any increase in the fee determined for Petitioner on an hourly basis, and *no findings grounded in that record* are contained in the District Court's second fee decision as to the "quality" of Petitioner's alleged services. Further, because of the high hourly rates applied in its "lodestar" determination for Petitioner's claimed services for reviewing claim forms, telephone calls, correspondence, and other routine tasks in this non-litigated case, there was no basis for any increase in fees over and above the hourly fee because of any outstanding or exceptional quality work performed by Petitioner.

If, *in arguendo,* the District Court had found as a fact that some aspect of Petitioner's services involved an "un-

usual degree of skill'' and was of such ''atypical quality'' as to warrant an award over and above the amount found to constitute reasonable compensation in its ''lodestar'' determination, that increase should have been directly related to the amount of time devoted to that given activity (*i.e.*, Petitioner's 53 hours devoted to settlement negotiations or the 33 hours of his entire office claimed for pleadings and motions). *Lindy I, supra,* 487 F.2d 168-169.

In *Lindy II,* the majority stated:

> If, on the basis of the quality of services rendered, the court is persuaded, that an increase or decrease in the 'lodestar' is warranted, it should identify those factors supporting its conclusions, state the specific amount by which the basic fee should be altered due to the quality of work, and give a brief statement of reasons therefor. Slip op. at 25.

Earlier this Court held in *Grinnell I:* [M]ore is needed than a mere listing of factors.'' 495 F.2d at 470.

In the absence of factual findings and record support, the District Court's unwarranted increase of Petitioner's fees found to constitute reasonable compensation for his claimed services on an hourly basis was reversible error. In *Pitchford* v. *Pepi Inc.,* 531 F.2d 92,110 (3rd Cir. 1976), the Court recently set aside a fee award ''[b]ecause the explicit findings and analysis required by *Lindy* were not explicated....''

III.

THE COURT ERRED IN ITS "LODESTAR" DETERMINATION

The District Court also committed error in arriving at its ''lodestar'' determination. It taxed Petitioner's claimed services against the class at unreasonable hourly rates, and awarded fees for certain categories of claimed services which conferred no benefit upon the class, but were antagonistic to its interest. Again, despite the requirements of *Grinnell I,* the District Court's decision is wholly devoid of the required factual findings on these contested issues (*See* Prehearing Memorandum Of Objectors . . ., A740).

The District Court conceded that the hourly rates claimed in this case for four attorneys in Petitioner's office were *higher* than those claimed for the *same* attorneys in the *Lindy* litigation (A1177). The Court below adopted the higher rates urged by Petitioner in this case and attempted to support this inconsistency with the following rationale: "Part of that difference [in hourly rates] is attributable to the time when the services were rendered and the balance is not sufficient to justify reduction" (A1177). The District Court's reasoning is wholly without foundation or justification.

Attorneys are to be awarded under both the *Lindy* decisions and *Grinnell I* at their "normal billing rates." However, the District Court made no findings as to why Petitioner should have different "normal" hourly rates for this case than the *Lindy* litigation, the result of which is to award Petitioner with windfall fees and unreasonably tax the unrepresented class members. The District Court's unsupported conclusion that "part of . . . [the] difference is attributable to the time when the services were rendered" is clearly erroneous because the rates which the Court adopted in the *Lindy* litigation were suggested by Petitioner in that case in 1974: They were the rates which Petitioner claimed would have been charged by him *at that time,* not in the 1960's when the time was purportedly expended. In this case, most of the claimed services by those attorneys in Petitioner's firm for whom increased rates were applied were rendered in the late 1960's and early 1970's. In fact, one attorney whose rate was increased $30 per hour in this case over the rate Petitioner claimed for this same attorney in the *Lindy* case left Petitioner's office in early 1972 (A795).

Nonetheless, the rates for four attorneys who spent a considerable amount of time on this litigation were increased substantially by the District Court over that found to constitute "normal billing rates" for the attorneys in Petitioner's office by the District Court for the Eastern

District of Pennsylvania in which they practice.[21] 382 F.Supp. at 1006.[22] The rates for Messrs. Newberg and Montague were increased from $70 to $100 per hour, or roughly one-third, and for Mr. Schambelan from $50 to $65 an hour and for Mr. Rodos, from $35 to $50 per hour. Because for most categories of activities the rates were multiplied by 3 in this case, the net effect is that for Messrs. Newberg and Montague, for example, the class was assessed virtually $100 per hour more for their time than their "normal billing rates" of $70 per hour during the relevant time period.

Hence, the District Court's cavalier comment that "the balance is not sufficient to justify reduction" is wholly without justification and reveals that though sitting in equity, it did not have a "jealous regard" for the rights of the absent class members. *Grinnell I*, 495 F.2d at 469. Even if the unwarranted multiple of three had not been applied to Petitioner's "normal billing rates," the difference of $30 per hour for the attorneys who claimed most of the time in Petitioner's office on this case resulted in a significant unfair taxation against the class in view of the number of hours claimed.

Moreover, in *Grinnell I*, this Court quoted the following from *Lindy I*:

> '[T]he court may find that the reasonable rate for compensation differs for different activities.' 495 F.2d at 471.

Also, this Court recognized that in a settled class action, many tasks may not require high caliber legal services

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[21] Any suggestion that Petitioner should receive higher rates when practicing in the Southern District of New York than in his home District—or in some other part of the country—borders on the absurd, and would be contrary to the rule of *Grinnell I* that "normal billing rates" provide reasonable and just compensation for an attorney's services. Petitioner's overhead costs remain the same regardless of where his cases are pending; any added expenses incurred by Petitioner after these cases were transferred have been reimbursed as out-of-pocket expenses, and the hours claimed include travel time (A785).

[22] In *Lindy II*, Petitioner did not challenge the adequacy of these rates, and, indeed they were suggested by his counsel in the *Lindy* litigation.

warranting remuneration at an attorney's normal billing rate:

> It is conceivable that large amounts of time could have been spent on comparatively routine matters or in ministerial duties. 495 F.2d at 473.

This was, in fact, true in this case as the panel in *Grinnell I* foresaw. Petitioner's office claimed that approximately 2,000 of the 3,500 hours allegedly expended on this case was for "settlement procedures" and "settlement administration" (A1178).

At the evidentiary hearing held on remand, the attorney who was primarily responsible for supervising "settlement administration" in Petitioner's office (A789) testified: "Attorneys, including myself, reviewed personally a substantial number [of claim forms]" (A786). He further testified that work in administering the settlement included telephone calls and correspondence (A787). Incredibly, that attorney's "reconstructed" time includes, for example, a claim of 10½ hours on February 25, 1972 for review of claim forms, 10 hours on February 26, 1972 and 13½ hours on February 28, 1972 (A933-A934). That attorney, whose hourly rate was increased by $30 from his normal billing rate in 1974, expended approximately 725 hours on settlement procedures and in administering the settlement (A972) for which the class was charged $200 to $300 per hour. In fact, Petitioner himself claims he expended 2½ times as many hours on those same matters as he did in settlement negotiations with the defendants. Petitioner claimed that another attorney expended approximately 300 hours on settlement administration in the first quarter of 1972; on twelve days, he claimed 9 to 11 hours (A966-A968) performing these routine tasks for which the class was charged $100 per hour (2 x's $50) even though he was admitted to practice for less than a year at the time he reviewed the claim forms.

The District Court below not only applied full hourly rates in its "lodestar" determination to the time claimed for these routine tasks, but then unwarrantedly tripled the almost 400 hours claimed by Petitioner for settlement

procedures, and doubled the 1,350 hours claimed for settlement administration without the requisite finding—which was not possible—that this work was exceptional and of atypical high quality. Judge Wyatt's comments in *Pfizer, supra,* are wholly apropos here: "A considerable amount of time must have been spent in processing consumer claims; while this had to be done by somebody, it is not work requiring any great amount of professional skill." 345 F. Supp. at 484.

Also, *Lindy II* emphatically reaffirmed the principle that fees may be taxed against the class under the equitable fund theory doctrine only for services actually conferring a benefit on the class. Slip op. at 9. In the *Lindy* litigation, fees were disallowed for time expended in negotiating fee agreements,[23] but the Court below awarded fees for that time as it did for the time claimed for interventions. (A1178). While the majority (and Objectors contend incorrectly) approved the award of fees for interventions in *Lindy II,* it noted that the District Court *made specific factual findings* as to the benefit conferred on the class by interventions in that case. *Lindy II,* Slip. op. at 11-13. Further, Objectors respectfully submit that the better view was expressed in *Lindy II* by Judges Gibbons and Seitz who found that the interventions in that case conferred no benefit on the class, endorsing the view expressed in this Circuit by Judge Wyatt in *Pfizer, supra:*

> Judge Wyatt of the Southern District of New York has taken what seems to be the first step toward curbing abuse of the practice by denying Berger and Kohn compensation for intervention work performed in connection with the massive antibiotic industry antitrust suit settled in his court. In denying the fee request Judge Wyatt observed: 'As to such attempted interventions, hours spent in such work, whether by the Berger firm or the Kohn firm, ought to be disregarded because there was never any reason for it.' . . . Slip op. at 38. (Footnote omitted.)

In this case, the time expended on interventions should have been excluded from the District Court's "lodestar"

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[23] 382 F. Supp. at 1012, *aff'd, Lindy II,* Slip op. at 7.

determination as there were no findings that this time conferred any benefit on the class. Likewise, the time claimed by Petitioner pressing his fee application should have been excluded from the District Court's "lodestar" determination. In reversing in *Lindy II* the District Court's award of fees for the time expended on the fee application, the Court held:

> [W]e accept the prevailing rule for litigation involving the competing interests of claimants to a common fund. . . . There being no benefit to the fund from services performed by appellees in connection with their fee application, there should be no attorney's fee award from the fund for those services. Slip op. at 10.

In summary, the District Court erred in its "lodestar" determination by applying excessive rates for certain attorneys in Petitioner's office (*e.g.*, $100 vs. $70 per hour), applying excessive rates for routine tasks (*e.g.*, $100 per hour for settlement administration) and awarding fees for time claimed which conferred no benefit on the class (*e.g.*, on Petitioner's fee application).

IV.

PETITIONER'S "RECONSTRUCTION" OF HIS TIME CLAIMS PROVIDED AN INADEQUATE EVIDENTIARY BASIS FOR THE DISTRICT COURT'S FEE AWARD

Because of the importance of the time factor in making fee awards under *Lindy I*, in *Merola, supra,* 493 F.2d at 296, n. 14, the Third Circuit held that when a fee applicant fails to support his time claims with adequate evidentiary proofs, no fee award can be made:

> Given the inadequacy of the proofs, had defendant-appellee not conceded that 264.2 hours were spent, there might well have been insufficient evidence to make any finding regarding the time spent.

Here, Petitioner's time claims are very much in dispute in view of the significant gaps in his record keeping procedures and the absence of contemporaneously generated records for much of the time claimed (A747-A751). Despite

the admitted lack of contemporaneous time records during at least part of the period of time in which services are claimed in this case, Petitioner made the following specific, sworn claims in his affidavit of April 20, 1972, filed below in support of his fee application: "From July 1, 1968 through April 19, 1972, Messrs. Berger, Montague, Schambelan and Newburg, senior attorneys in David Berger, P.A., spent a total of 1,814.45 hours [on the *Grinnell* case]" (A1023).[24]

The necessity for an attorney who intends to petition for a fee award to maintain and support his time claims with contemporaneous time records is not novel, and does not have its genesis in *Lindy I, Merola,* or *Grinnell I.* To the contrary, over a decade ago in *In re Hudson & Manhattan Railroad Co.,* 339 F.2d 114, 115 (2d Cir. 1964), Chief Judge Lumbard stated:

> We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent. . . . There is no excuse . . . to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect the court to do so.

Similarly, in *In re Wal-Feld Co.,* 345 F.2d 676, 677 (2d Cir. 1965), Judge Lumbard again stated:

> We recently held that a law firm was not entitled to the full amount which it sought for its services . . . because the firm had failed to keep accurate time records.

In re Hudson & Manhattan and *Wal-Feld* have been the law of this Circuit for over a decade. More recently, in *Lewis* v. *Wells,* 325 F. Supp. 382, 387 (S.D.N.Y. 1971), Judge Weinfeld commented: "Surely daily registers are still maintained in law offices." (Footnote omitted.)

Without making any factual findings as to the accuracy of the "reconstruction" of Petitioner's time claims, Judge

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[24] Mr. Schambelan, a so-called "senior" attorney, was admitted to practice *less than three* years when these complaints were filed (A974).

Metzner summarily concluded: "After hearing the evidence, I find that the hours allocated for the periods that were not supported by time records are fair and reasonable" (A1177). In stark contrast, during the course of the November 1975 evidentiary hearing—some five months prior to the issuance of the second fee decision—Judge Metzner candidly characterized the testimony of one attorney who reconstructed substantial blocks of time as follows: "He doesn't claim an accurate reconstruction" (A799). Also, that attorney admitted below that he had stated in the *Lindy* case that "reconstruction is an inexact science" (A795-A796). The Court further characterized his testimony during the course of the hearing as stating that he didn't claim that his reconstruction "was accurate" and that "by its very nature it can't be accurate," but merely a "ball park estimate" (A799). In fact, the Court commented on the testimony on the alleged "reconstruction" of the time claims as follows: "I don't think anybody here will take the position it is accurate, in the sense of being exact" (A799-A800).

Further, the attorney who sponsored the time claims of Petitioner's office testified that "reconstruction" of the time for this case was undertaken in 1972, prior to Petitioner's filing his first fee petition, but he could not exactly remember when it was reconstructed (A772-773). His affidavit sponsoring Petitioner's office's time claims in the District Court was sworn to on October 28, 1975, some *three and a half years* after the alleged "reconstruction" was undertaken (A910). Thus, he testified that "it would be impossible for me to know which day I spent those hours," *i.e.*, hours devoted to a particular event which he reconstructed (A774). Also, he had *no work sheets* showing how the hours were reconstructed (A776). Moreover, he testified that he reconstructed the time "so we could get a ball park figure" (A777). Further, he later claimed that "I don't consider that time being reconstructed," *i.e.*, the time attributed to Petitioner for certain events, and conceded that he did not have a general rule as to the methodology used for reconstruction (A791).

In view of this Court's specific warning in remanding this case in *Grinnell I* that fee awards should be made with moderation and "a jealous regard" for those who are interested in the fund, 495 F.2d at 469, a court of equity should have minutely scrutinized the very specific and self-serving time claims made by Petitioner in view of admitted gaps in his time keeping procedures and the absence of contemporary time records for significant periods of time. Because of the direct conflict of interest between Petitioner and the class on fee matters, his time claims are, at best, incredible in light of the fact that there are no time records or work papers to support claims of, for example 16.5 hours per day on this one case for which *no* explanation of the type of activity engaged in was given (A934).

Nonetheless, the District Court took at face value, without making any factual findings, all of Petitioner's time claims. This error was particularly egregious in this case because the fee determined on the basis of the "restructured" time was then multiplied by three. Further, by taking Petitioner's "reconstructed" time claims at face value, the District Court wholly undermined the principles of *In re Hudson & Manhattan, supra,* and its progeny. Applying that rule in *In re General Economics Corporation,* 360 F.2d 762, 765 (2d Cir. 1966), this Court reduced the District Court's fee allowance because the time records submitted were "of a fragmentary nature." More recently, in *In re Matter of Am. Exp. Warehousing, Ltd.,* 525 F.2d 1012, 1016, n. 15 (2d Cir. 1975), Chief Judge Kaufman stated:

> In support of its $800,000 request, the OCC proffered an affidavit containing merely a general description of the services it had rendered and the total number of hours for which the law firms sought compensation. A claim of this magnitude could not properly have been granted upon such a vague and insubstantial showing.

Also, in *In re Meade Land & Development Co., Inc.,* 527 F.2d 280, 283 (3rd Cir. 1975), the Court held: "[P]etitioner failed to establish with requisite records how the total time for which compensation was claimed had been spent."

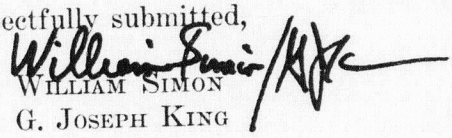
Likewise, in view of the lack of Petitioner's contemporaneous time records, the District Court's unsupported conclusory holding as to the accuracy of his time claims as an evidentiary basis for assessing fees of almost $900,000 against the unrepresented class members was not only clearly erroneous, but also constituted an error of law because of its departure from the law of this Circuit.

V.

CONCLUSION

For all of the foregoing reasons, the District Court's second fee award to Petitioner should be reversed.

Respectfully submitted,



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July 30, 1976

ADDENDUM

ADDENDUM

OPINION OF THE COURT

(Decided May 13, 1974)

Before MOORE and HAYS, *Circuit Judges,* and BRYAN, *District Judge.**

MOORE, *Circuit Judge:*

This is an appeal from the District Court's approval of a proposed settlement, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of three consolidated private antitrust national class actions brought in October, 1968, by commercial, industrial and governmental subscribers of "central station protection services" against four defendant corporations to recover treble damages plus attorneys' fees and costs under Section 4 of the Clayton Act. 15 U.S.C. § 15 (1970). The approved settlement, filed on December 27, 1972, calls for payment by the four defendants of $10 million to the three classes of plaintiffs and, in addition, grants a fee award of $1.5 million to counsel for the class representatives. The District Court retained jurisdiction over the case for the purposes of determining whether four other petitioning firms were entitled to share in this fee. The first group of appellants, consisting of members of the represented classes, attacks the settlement on the ground that it is so small as to be grossly unfair on its face. They also object to the manner in which the District Court approved the settlement. A second group of appellants, also members of the represented classes, seeks to overturn the fee award and to prohibit any outside attorneys from sharing in whatever award might ultimately be made.

Although all considerations point to the fact that the $10 million dollar settlement is fair and equitable, those same considerations do not justify such a large counsel

* Of the Southern District of New York, sitting by designation.

fee award. Consequently, we affirm the District Court's approval of the settlement and reverse and remand for a hearing as to the fee award. We do not yet have the jurisdiction necessary to decide whether anyone other than counsel for the class representatives ought to share in any fee which might ultimately be awarded.

The Facts

Defendants American District Telegraph Company (ADT), Grinnell Corporation (Grinnell), Holmes Electric Protective Company (Holmes) and Automatic Fire Alarm Company (AFA) are in the business of providing "central station protection services" against the hazards of loss by burglary or fire. Alarm systems are installed on the premises of their customers, and protection services are furnished under subscriber contracts. "Central stations" are maintained in various cities throughout the country where the alarm devices on the protected premises are monitored.

The class actions in issue developed out of a civil injunctive action brought by the United States against the defendants. On November 27, 1964, Judge Wyzanski filed an opinion finding violations of Sections 1 and 2 of the Sherman Act. United States v. Grinnell Corporation, 236 F. Supp. 244 (D.R.I. 1964). On June 13, 1966, the Supreme Court, in a six-to-three decision, affirmed the District Court in part, reversed in part, and remanded for further hearings on relief. United States v. Grinnell Corporation, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). After more than a year of extensive further documentation, depositions, negotiations and hearings, Judge Wyzanski entered a final decree on July 11, 1967. Aside from awarding generalized injunctive relief, including a prohibition against predatory pricing "at unreasonably low charges," the final decree directed varying amounts of divestiture of the assets by American District Telegraph Company in twenty-one of the one hundred and fifteen cities served by

ADT, and directed other relief relating to the offering of contracts by ADT to competitors in five cities.

Thereafter two treble damage actions were brought in the United States District Court for the Eastern District of Pennsylvania by *competitors* of the defendants, Robinson Electric Protective Corporation v. Grinnell Corporation, Civ. No. 27961 and Sentinel Alarm Corporation v. Grinnell Corporation, Civ. No. 36061. The theory of these cases was that the defendants, beginning in 1958, had attempted to drive them out of business by predatory pricing. After extensive discovery covering pricing practices, the defendants settled the case prior to trial. A series of suits instituted by both competitors and subscribers of the alarm company defendants followed. Suits were filed by over forty-eight competitors alleging predatory pricing practices in over thirty cities throughout the United States. In addition to the three national class actions *sub judice*, over fifty-four other individual subscriber actions were filed by other counsel.

In July, 1968, these three national class actions were commenced in the United States District Court for the Eastern District of Pennsylvania for all governmental, commercial and industrial subscribers of the defendants. The breadth of these classes is such that the only subscribers not covered are homeowners, federal governmental agencies and governmental entities in three states [1] which are represented in separate statewide class actions.

On October 3, 1968, the national class actions, along with all but one other pending competitor case, were transferred pursuant to 28 U.S.C. § 1407, to the United States District Court for the Southern District of New York for consolidation and coordination for pre-trial purposes.

At the time this settlement agreement was executed, on August 27, 1971, the national class actions had been pend-

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1 Connecticut, Maryland and New Jersey.

ing for more than three years. Discovery by interrogatories and requests for production of documents had been substantially completed. All preliminary motions were filed, briefed, argued and resolved by judicial decision. As a result of the ruling on defendants' partial summary judgment motion, sub. nom. Russ Toggs, Inc. v. Grinnell Corporation, 304 F. Supp. 279 (S.D.N.Y. 1969), aff'd 426 F.2d 850 (2d Cir.), cert. denied, 400 U.S. 878, 91 S.Ct. 119, 27 L.Ed.2d 115 (1970), the three national class actions were held to have been timely filed. However, the rulings clearly established that with respect to any unfiled cases, the statute of limitations expired in September, 1968. A determination of the validity of the class action device, earlier stayed until defendants' motion for partial summary judgment had been adjudicated, was briefed and supported by affidavits and a hearing was held before the District Court on June 18, 1971. It was after the class action hearing that settlement negotiations between class counsel and counsel for defendants became serious. As a result, the District Court was asked to withhold any class action determination until after the settlement negotiations had been exhausted. Thereafter, settlement negotiations resulted in the settlement agreement dated August 27, 1971.

The Settlement Agreement on behalf of these three national class actions provided for the creation of a settlement fund in the amount of $10 million payable to the classes over a five year period, with interest. The period for includable transactions on which the allocation of the settlement fund is based is the period from April 13, 1957 (four years prior to the institution of the government case) to July 11, 1968 (the day after the actions were filed and one year after entry of the final decree in the government case). Notice was mailed at defendants' expense to 89,000 of their known customers and was also published for three consecutive weeks in all editions of the *Wall Street Journal* and the *New York Times*. Fourteen thousand one hundred fifty-six claimants filed claims. One hundred eighty-four

attorneys and firms filed notices of appearance on behalf of the claimants and were served with defendants' papers in support of the settlement. A number of the plaintiffs in the individual subscriber nonclass actions decided to participate in the settlement as well.

After receiving documents from counsel for class representatives and counsel for defendants in support of the proposed settlement, and all claimants having an opportunity to file objections and papers in support thereof, the District Court held hearings on May 24 and 25, 1972, so that it might rule on the propriety of the settlement agreement, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and might award fair and adequate attorneys' fees to those who had represented the interests of the classes. On December 27, 1972, the District Court approved the settlement agreement and awarded, out of the settlement fund, $1.5 million plus $14,918.73 out-of-pocket expenses, to counsel for the class representatives, David Berger, Esq. and David Berger, P.A. The Court determined that further hearings would be necessary before it could decide whether other attorneys should share in the fee award.

Under the proposed settlement and the final judgment approving it, the treble damage claims of the classes are dismissed with prejudice.

* * * * *

The Fee Award *

On December 27, 1972, the District Court rendered its decision approving the settlement and awarding attorneys' fees of $1.5 million, plus disbursements of $14,918.73, to David Berger and his law firm, David Berger, P.A.[11] A

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* The extensive portion of the decision approving the settlement (officially reported in 495 F.2d at 454-468) which is not at issue in this second appeal has been omitted from this Addendum.

11 Petitioner had filed a request for $2.5 million in fees. *See* Petition Of Counsel For The Class Representatives For Award Of Counsel Fees And Costs, Appendix, Vol. II, at 101.

second group of appellants objects to the $1.5 million counsel fee award made by the District Court. These appellants claim that this fee award was completely out of proportion to any services performed by counsel and that it reflects the District Court's *de facto* reliance on the contingent fee approach, an approach which, they submit, is impermissible in this type of case. Moreover, appellants point out that contrary to the suggestions of the Supreme Court of the United States and in violation of its own order, the District Court in this case awarded the fee without accepting any testimony, without holding an evidentiary hearing and with only the benefit of oral argument before it.

Because we feel that this fee was excessive and displayed too much reliance upon the contingent fee syndrome and because we feel that an evidentiary hearing was imperative in this case, we reverse and remand this portion of the District Court's judgment and direct that Court to hold such hearings, consistent with this opinion, to provide sufficient information so that a fair and adequate fee award may be made.

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970),[12] which provides for the award of attorneys' fees in civil antitrust suits generally, does not authorize award of attorneys' fees to a plaintiff who does not recover a judgment or who settles his claim with the defendant. Byram Concretanks, Inc. v. Warren Concrete Products Co., 374 F.2d 649, 651 (3d Cir. 1967). Similarly, Rule 23 of the Federal Rules of Civil Procedure has no fee provision. The only basis for awarding an attorney's fee in such cases is the equitable fund theory doctrine, which may be used

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12 Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court in the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, *including reasonable attorney's fee.* 15 U.S.C. § 15 (1970). (Emphasis supplied.)

to "make fair and just allowances for expenses and counsel fees to [those] parties promoting litigation. . . ." Trustees v. Greenough, 105 U.S. 527, 536, 26 L.Ed. 1157 (1881). "Allowance of such costs in appropriate situations" has been called "part of the historic equity jurisdiction of the federal courts." Sprague v. Ticonic National Bank, 307 U.S. 161, 164, 59 S.Ct. 777, 779, 83 L.Ed. 1184 (1938). *See also* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-392, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). Under this theory claims may be filed not only by a party to the litigation, but also by an attorney whose actions conferred a benefit upon a given group or class of litigants. The underlying principle here is that the members of the group should pay "compensation as was reasonable" above and beyond reimbursement for out-of-pocket expense to the attorney representing their interests. Central Railroad & Banking Co. v. Pettus, 113 U.S. 116, 125, 5 S.Ct. 387, 28 L.Ed. 915 (1885).

The practice of awarding attorneys' fees is one that has been "delicate, embarrassing and disturbing" for the courts. Milwaukee Towne Corp. v. Loew's Inc., 190 F.2d 561, 569 (7th Cir. 1951), cert. denied, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). This embarrassment is rooted in the fact that "the bitterest complaints [about the legal profession] from laymen [are directed at] the windfall fees and featherbedding that lawyers have managed to perpetuate through . . . their influence with the judiciary." Graham, Guest Opinion on Legal Fees: Fluffing the Golden Fleece, Juris Doctor, 10, 11 (February, 1973).

Unfortunately, there has been more than a little justification for the dissatisfaction of the lay community with the application of the equitable fund doctrine under Rule 23. Criticism has been rampant even within the judiciary. In Illinois v. Harper & Row Publishers, 55 F.R.D. 221 (N.D. Ill. 1972), the District Court observed that:

> If Rule 23 is to be preserved against *deserved* criticism, some attempt must be made by the court to suit

> the award of the fees to the performance of the individual counsel in light of the size of the settlement. Otherwise, the attorneys who are taking advantage of class actions to obtain lucrative fees will find themselves vulnerable to the criticism expressed in the Italian proverb, 'A lawsuit is a fruit tree planted in a lawyer's garden.'

55 F.R.D., at 224. (Emphasis supplied.)

In a similar vein the United States District Court for the Southern District of New York pointed out: "[I]t [the Rule 23 class action] has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees." Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 30 (S.D.N.Y. 1972). Finally, dissenting in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (Eisen II), then Chief Judge Lumbard wrote: "Obviously the only persons to gain from a class suit are not the potential plaintiffs, but the attorneys who will represent them." 391 F.2d at 571.

For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding "windfall fees" and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in Trustees v. Greenough, *supra,* when it advised that fee awards under the equitable fund doctrine were proper only "if made with moderation and a jealous regard to the rights of those who are interested in the fund." 105 U.S., at 536. *See also* Wewoka v. Banker, 117 F.2d 839, 841 (10th Cir. 1941). The award must be made with an eye to moderation and, if for no other reason but to allay suspicion, the court should typically take pains to allow a complete airing of all objection to a petitioner's fee claim.

In its simplest terms, the purpose of the fee award is to "compensate the attorney for the reasonable value of

services benefitting the . . . claimant." Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corporation, *supra,* 487 F.2d at 167. There are many parameters that affect the value of legal services and which, therefore, must be considered by a court in evaluating a fee request. In another recent antitrust case the District Court which granted the instant fee petition enumerated those parameters. In Transworld Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970), modified on appeal, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the District Court adopted the "generally accepted factors to be weighed in determining a reasonable attorney's fee" from Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258 (M.D. Pa. 1965), vacated on other grounds, 377 F.2d 776 (3d Cir. 1967), aff'd in part and rev'd in part, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), *viz.:*

> (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,
>
> (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel,
>
> (3) time and labor spent,
>
> (4) magnitude and complexity of the litigation,
>
> (5) responsibility undertaken,
>
> (6) the amount recovered,
>
> (7) the knowledge the court has of conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,
>
> (8) what it would be reasonable for counsel to charge a victorious plaintiff.

312 F. Supp., at 480.

Finally, the District Court added that the attorney's "risk in litigation" is another factor to be considered.

This conceptual amalgam is so extensive and ponderous that it is probably not employed in any precise way by those courts espousing adherence to it. That fact is brought home here by the opinion of the District Court which, while eschewing any reliance upon a percentage fee approach, ostensibly applied these cumbersome rules but nevertheless concluded that the fee award ought to amount to $1.5 million, namely, fifteen percent of the settlement recovery.

As the Third Circuit has recently pointed out in *Lindy Bros., supra*, more is needed than a mere listing of factors. Such a list, standing alone, can never provide meaningful guidance.

The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.

> No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended. Yet unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench will be brought into disrepute, and there will be prejudice to those whose substantative interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation.

Cherner v. Transitron Electronic Corp., 221 F. Supp. 55, 61 (D. Mass. 1963).

Once the District Court ascertains the number of hours that the attorney and his firm spent on the case, it must attempt to value that time. Valuation obviously requires some fairly definite information as to the way in which that time was spent (discovery, oral argument, negotiation, etc.) and by whom (senior partners, junior partners or associates). Once this information is obtained, the easiest way for the court to compute value is to multiply the number of hours that each lawyer worked on the case by the hourly amount to which attorneys of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation.

> A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate). Where several attorneys file a joint petition for fees, the court may find it necessary to use several different rates for the different attorneys. Similarly, the court may find that the reasonable rate for compensation differs for different activities.

Lindy Bros., *supra,* 487 F.2d at 167.

We are not under the illusion that a "just and adequate" fee can necessarily be ascertained by merely multiplying attorney's hours and typical hourly fees. However, we are convinced that this simple mathematical exercise is the only legitimate starting point for analysis. It is only after such a calculation that other, less objective factors, can be introduced into the calculus.

Perhaps the foremost of these factors is the attorney's "risk of litigation," *i.e.*, the fact that, despite the most vigorous and competent of efforts, success is never guaranteed. The greater the probability of success, of either ultimate victory on the merits or of settlement, the less this consideration should serve to amplify the basic hourly fee. The tangible factors which comprise the "risk of litigation" might be determined by asking the following questons: has

a relevant government action been instituted or, perhaps, even successfully concluded against the defendant; have related civil actions already been instituted by others; and, are the issues novel and complex or straightforward and well worn? Thus determined, the litigation risk factor might be well translated into mathematical terms.

It may be argued that by minimizing the important role traditionally played by the magnitude of the recovery, there will be considerably less incentive for the class attorney, particularly when negotiating a settlement, to seek as high a recovery as possible. Conversely, it can be complained that such a rule will encourage counsel to avoid quick settlement or, indeed, any settlement, in hopes of prolonging the proceedings and accumulating billable hours. Although there may be some truth in these arguments, we feel that their impact can be minimized by an intensified scrutiny on the part of the court which must approve each negotiated settlement.

When it sets a monetary value on a lawyer's services, the District Court must be in possession of an enormous amount of information. It must know how much each contributing lawyer devoted to each task resulting in the formation of the settlement fund; it must be aware of the billing rate properly applied to each of these manhours; and it must be sensitive to those factors, tangible and intangible, which comprise the "risk of litigation."

Because this information is so vital, Rule 11B of the Local Rules of the Southern District of New York provides that:

> Fees for attorneys or others shall not be paid upon the recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct.

And, since resolution of disputed factual issues necessitates the hearing of testimony, *see* Ellis v. Flying Tiger

Corporation, No. 71-1704 (7th Cir. October 27, 1972) and is particularly facilitated by cross-examination, *see* Milwaukee Towne Corp. v. Loew's Inc., 190 F.2d 561, 571 (7th Cir. 1951), cert. denied, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952) one appellate court has been prompted to hold that: "[A]lthough expert opinion evidence is not required in awarding attorneys' fees, where the facts to be weighed in light of the judge's expertise are disputed, an evidentiary hearing is required. *See* Thomas v. Honeybrook Mines, Inc., 428 F.2d 981, 988-989 (3d Cir. 1970), cert. denied, 401 U.S. 911, 91 S.Ct. 874, 27 L.Ed.2d 809 (1971)." Lindy Bros., *supra*, 487 F.2d at 169.

The Supreme Court endorsed this view in cases involving the award of attorneys' fees under Section 4 of the Clayton Act. In Perkins v. Standard Oil Co., 399 U.S. 222, 90 S.Ct. 1989, 26 L.Ed.2d 534 (1970), the Court stated that: "[T]he amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after *hearing evidence* as to the extent and nature of services rendered." 399 U.S., at 223, 90 S.Ct., at 1990 (Emphasis supplied). *See also* West v. H. K. Ferguson Company, 382 F.2d 630, 633 (10th Cir. 1967); In re Hudson & Manhattan Railroad Company, 339 F.2d 114, 115 (2d Cir. 1964); In re Hardwick & Magee Company, 355 F. Supp. 58, 75 (E.D. Pa. 1973); Lewis v. Wells, 325 F. Supp. 382, 387 (S.D.N.Y. 1971).

In the instant case the District Court sent a legal notice, dated December 13, 1971, to all class members informing them of the prospective settlement. Paragraph 6 of that notice proclaimed that:

> [T]he Court has directed that a hearing be held on April 27, 1972 . . . . [A]ny member of the class who has not requested exclusion and has timely filed a Sworn Statement of Claim may appear at such hearing in person or by counsel and may show cause, if any he has, . . . why fees and allowances should not

> be granted and why judgments thereon should not be entered, and may present any evidence that may be proper and relevant to the issues to be heard. . . .

Appendix, Vol. II, at 78.

Contrary to the terms of this notice, the Court made its fee award after it had refused to hold an evidentiary hearing, Hearing of April 10, 1972, at 3, and with only the benefit of oral argument and submitted papers to guide it, in spite of the fact that counsel for the appellants stated to the Court that he "proposed to present evidence" on the matter of the fee application. Excerpts from Transcript of Hearing Before Judge Metzner, May 24, 1972, Vol. II, at 504; Excerpts from Transcript of Hearing Before Judge Metzner, June 5, 1972, Vol. II, at 558. The most basic dispute focuses on petitioner's claim, rejected by both appellants and third parties, that he and the members of his firm expended 2,357 hours in the litigation of this case.[13] *See* Statements of Messrs. Robinson, Hoffman & Stein, Appendix, Vol. II, at 270, 296, 242. There is no doubt that, in a case such as this, where there were many vigorous disputes of fact over the elements that comprised the fee

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[13] Appelee Berger claims to have expended 2,357 hours of attorney's time on behalf of these plaintiffs without regard to the type of work and by whom performed, namely, partner, senior associate, junior associate, or clerk. The District Court fee award of $1.5 million thus compensated him at the rate of $635 per attorney-hour.

Appellee has attempted to justify his fee by pointing to other cases where the fee awards were even more grandiose. He observes that in one dispute litigated in the New York State courts, a distinguished practitioner was compensated at the rate of $3,590 per hour. Sullivan and Cromwell v. Hudson and Manhattan Corporation, 35 A.D.2d 1084, 316 N.Y.S.2d 604 (1st Dep't 1970), aff'd, 29 N.Y.2d 523, 324 N.Y.S.2d 79, 272 N.E.2d 572 (1971).

However, instead of bolstering his position, these observations merely illustrate the results that accrue when a fee is awarded on a contingency basis without reference to the labor actually expended on the client's behalf.

award, an evidentiary hearing, complete with cross-examination, is imperative.

Even if there were no disputes over the claims made by petitioner, there would still remain a need for an additional hearing to fill the many factual voids which remain before an adequate fee can be fairly determined. Petitioner lumps together the hours for four lawyers in his office whom he calls "senior attorneys" and who allegedly spent 1,814 hours on this case, yet he does not define what he means by the term "senior attorney". Petitioner, likewise, provides no breakdown of any of the time claimed into the various facets of the case. It is conceivable that large amounts of time could have been spent on comparatively routine matters or in ministerial duties.

The Court will need to know the experience and training of petitioner's para-professional assistants and the rate at which he pays them since he must be reimbursed for their wages even though their time cannot be considered as input in the fee award determination. *See* In re Hardwick & Magee Co., *supra*, 355 F. Supp. at 58, 73; Trans World Airlines, *supra*, 312 F. Supp., at 482. Finally, there is insufficient evidence regarding petitioner's separate fee arrangements with various members of the classes he represented. Such information is vital to a determination of a fair and adequate fee. *Lindy Bros., supra*, 341 F. Supp., at 1090.

The guidelines to be followed on such a hearing which we adopt have been well summarized in the *Lindy Bros.* case *supra*, 487 F.2d, at 167, 170.

> To this end the first inquiry of the court should be into the hours spent by the attorneys—how many hours were spent in what manner by which attorneys. It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney. But without some fairly definite information as to the

hours devoted to various general activities, *e.g.*, pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, *e.g.*, senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought.

* * * * * *

The value of an attorney's time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate).

* * * * * *

Further, in increasing or decreasing an attorney's compensation, the district judge should set forth as specifically as possible the facts that support his conclusion, particularly where, as in this case, the judge determining the fees to be awarded did not sit in the case throughout the entire proceeding. The value to be placed on these additional factors will, of course, vary from case to case. Often, however, their value will bear a reasonable relationship to the aggregate hourly compensation.

We conclude, as did the Circuit Court in *Lindy Bros., supra,* that "the failure of the district court to hold an evidentiary hearing and its failure to follow proper standards in awarding fees to attorneys Kohn and Berger were inconsistent with the sound exercise of discretion."

Fee Apportionment *

* * * * *

The judgment approving the settlement is affirmed; the judgment as to the fee award is reversed and remanded for a hearing in accordance with this opinion; the judgment relating to the standing of other attorneys to participate in any fee award is dismissed for lack of appellate jurisdiction. Costs to abide the event.

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* The portion of the decision treating the "Fee Apportionment" (officially reported in 495 F.2d at 474-475) which is not at issue in this second appeal has been omitted from this Addendum.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF DETROIT, et al. v. GRINNELL CORPORATION, et al., BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY, Claimants, Appellants.	Docket No. 76-7252

CERTIFICATE OF SERVICE

I, G. Joseph King, an attorney for appellants in the above-entitled appeal, hereby certify that on the 30th day of July, 1976, I served two copies of the Brief For Class Members-Appellants and one copy of the two-volume Appendix, in accordance with Rules 25(a), 30(b) and 31(b), Fed.R.App.P., upon Gordon B. Spivack, Esquire, Lord, Day & Lord, 25 Broadway, New York, New York, 10004, by depositing same in the United States mail, first class postage prepaid.

G. Joseph King